No. 21216

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY C. KNOWLES,

Appellant,

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary,

Appellee.

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APPELLEE'S BRIEF

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Appeal from the United States District Court

For the District of Oregon

HONORABLE BRUCE R. THOMPSON, Judge

- - - - - - - - -

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION OF UNITED STATES DISTRICT COURT AND COURT OF APPEALS FOR NINTH CIRCUIT

Appellee joins in the statement of jurisdiction set forth at page 2 of Appellant's Brief.

II

APPELLEE'S STATEMENT OF THE CASE

Appellee does not join in the statement of the case prepared by appellant and herewith sets forth his own statement of the case.

A. Appellant's Grounds for Relief as set Forth in the Amended Petition.

In paragraph 4, page 2 of his petition (R 5), and at paragraph 39 (R 12) petitioner summarizes his grounds for relief as follows:

> "Your Petitioner bases this petition for a writ of habeas corpus upon the ground that his plea of guilty, entered on December 24, 1954 to the information filed in the Circuit Court of Oregon, Wasco County, charging him with murder in the second degree, <u>was made under circumstances rendering it involuntary</u> and in violation of Your Petitioner's rights under the Sixth and Fourteenth Amendments of the Constitution of the United States." (Emphasis supplied)

> "On Friday, December 24, 1954, Your Petitioner again appeared before the Circuit Court of Oregon for Wasco County. As a result (a) of the circumstances surrounding

> Your Petitioner's earlier confessions of guilt rendering said confessions involuntary and in violation of Your Petitioner's right to counsel, (b) Your Petitioner's ignorance of the legal significance of those circumstances, (c) Your Petitioner's ignorance at the time the confessions were obtained of his right to counsel and of his right to remain silent, and (d) as a result of the representations made by the District Attorney and the advice of his court appointed attorney, Your Petitioner signed a waiver of indictment and entered his plea of guilty to an information charging him with second degree murder."

Appellee filed an answer (R 57-63) putting in issue appellant's grounds for relief.

B. Judgment of the Court Below

After a trial of the issues of fact raised by the pleadings the court issued its Findings of Fact, Conclusions of Law and Judgment dismissing the petition which are set forth verbatim as an appendix to this brief (R 78-90, A-3 to A-16).*

The trial court found as a fact that the appellant voluntarily and with full understanding of the consequences plead guilty to the offense of second degree murder; that appellant's decision to plead guilty was reached voluntarily after consideration of the advice of competent counsel; that such decision was not the product of a promise of recommendation for an early parole because there was no such promise; and that the decision to plead guilty admittedly was influenced by the prospect of

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* The reference "A" in parenthesis followed by a number indicates a page reference to the appendix to this brief.

appellant's facing a charge of first degree murder (R 89-90, A-14 to A-15).

C. Appellee's Statement of the Facts*

1.

Introduction

Pages 3-16 of appellant's statement of the facts deal with background events occurring prior to appellant's plea of guilty.

Inasmuch as appellant's own testimony indicates that he did not want to plead guilty but did so because of his counsel's advice, see pp 12-14, infra, the prior statements appellant gave the police and the background events in which they occurred were not, so far as appellant was concerned, a factor in appellant's decision to plead guilty.

Accordingly, we deem this portion of appellant's statement neither necessary nor relevant to the decision in this case. In the event, however, that this court may wish to examine our version of such background events, and because the lower court made findings thereon, and because we do not entirely agree with the way appellant has set forth such events, we have set them forth in the appendix to this brief at pp A-31 to A-48.

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* Inasmuch as a substantial portion of our statement of facts will be the same as the lower court's findings of fact, we will add to the references to the record the abbreviation "Opin" when the fact recited is the same as that found by the court. References to the findings of the court will also include references to the appropriate pages of the appendix to this brief where the referred to portion of the lower court's findings may be found.

Facts Pertaining to Appellant's Plea of Guilty

On Tuesday afternoon, December 21, 1954, appellant arrived at The Dalles, Oregon, in the custody of the Sheriff of Wasco County, Oregon, and in the company of District Attorney Donald Heisler of Wasco County. (R 27, par 34, R 61, par XXII, Opin R 87, A-12, Tr 118).

Appellant, who had been awaiting sentencing by the Federal Court in Sacramento, California, on a Dyer Act charge (Ex 3, pp 1-4), had been released by the federal authorities in Sacramento to the Oregon authorities for a ten day period (Ex 3, p 7) on a writ of habeas corpus ad prosequendum issued out of the Wasco County Circuit Court. (R 27, par 31, 32, R 61, par XXII, Opin R 87, A-12). At the time the writ was issued a charge of second degree murder was pending in The Dalles, Oregon Justice Court. (Tr 133; Opin R 86-87, A-12).

On Wednesday morning, December 22, 1954, the District Attorney of Wasco County, Donald Heisler (Tr 118) after arranging to have appellant's case heard that morning by the Circuit Court of Wasco County, visited appellant in the Wasco County Jail. Although Heisler had a conversation with appellant, he did not represent to appellant that if appellant would waive indictment and plead guilty to an information charging second degree murder he (Heisler) would recommend an early parole (Tr 126-127, 129, 130; Opin R 87, A-13).

At the conclusion of Heisler's conversation with appellant,

ppellant was taken directly before the Circuit Court* of Wasco County although appellant had not been arraigned in Justice Court on the information filed there, given an opportunity for a preliminary hearing, or indicted by the grand jury (R 28, par 36, 61-62, par XXIV, Opin R 87, A-13). This procedure presupposed that appellant would waive preliminary hearing and indictment Tr 133; Opin R 87, A-13).**

When appellant appeared in the circuit court that morning, e sought to waive counsel and plead guilty, but the court eclined to permit him to do so and appointed Sam Van Vactor, n attorney practicing in The Dalles, Oregon, to represent him. Ex 2, pp 1-4; A-18 to A-21, Opin R 88, A-13).

When the Wasco County Circuit Court refused to permit appellant to plead guilty appellant stated (Ex 2, p 3, A-20):

"MR. KNOWLES: Well, Your Honor, could I say something, please?

THE COURT: Yes.

MR. KNOWLES: I can't understand why -- I can't see any sense of having an attorney. I've already committed the crime and admitted it and I'd kind of like to have this over with." (Emphasis supplied)

The transcript of the proceedings of appellant's appearances efore the Circuit Court of Wasco County is Exhibit 2. Said xhibit is set forth verbatim in the appendix to this brief (pp -17 to A-30) except for the scribbled comments appearing at pages and 11 of said exhibit which comments appellant on deposition not of record here) admitted to be his. These scribbled comments ere made several years after appellant's conviction and after he ad apparently learned to read and write.

* But see argument pp 18-19, infra.

Appellant thought the above quoted statement in his first appearance in court constituted a plea of guilty, because, as he described it in his testimony, he wanted to "change his plea" but his appointed counsel advised him not to. (Tr 50-51, 57-58).

Van Vactor, appellant's appointed attorney, had practiced as an attorney since 1932 (Tr 69).

After his appointment he made the usual investigation an attorney normally makes (Tr 70). He conferred with appellant and obtained appellant's story and discussed the case with the district attorney (Tr 70, 71; Opin R 88, A-13). He attempted to verify the information he received (Tr 71).

Because of the lapse of over 11 years since he had represented appellant (December 1954 to January 14, 1966, the date of the trial below) he was not able to remember what specific advice he gave appellant (Tr 70).

However, he did write a letter* in which he advised appellant as to parole entitlement under the various charges which Van Vactor felt appellant ought to know and which letter included what Van Vactor thought were "the various possibilities that were involved and what I considered the serious nature of the situation at that time" (Tr 70).

Van Vactor gave the letter to appellant and assumed that appellant read it (Tr 74) as appellant did not tell Van Vactor that he couldn't read (Tr 75).

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* Appellant didn't produce the letter and Mr. Van Vactor no longer had his copy (Tr 73-74).

Van Vactor also advised appellant that he would receive a life sentence on his plea of guilty to second degree murder (Ex 2, p 11; A-27 to A-28).

Appellant was also advised of his right to have his case presented to the grand jury or, if he so chose, to consent to the district attorney filing an information. (Ex 2, p 5; A-21 to A-22).

Appellant told Van Vactor of his prior confessions but did not explain the details or the circumstances which led to them (Tr 72; Opin R 88, A-13). Nor did appellant mention his conversation with Heisler. (Tr 49-50; Opin R 88, A-13).

Van Vactor's recollection was that he was not shown the written statements which had been obtained from appellant (Tr 72; Opin R 88, A-13).*

He felt, however, that he had had adequate time to investigate the case and felt that he was in possession of sufficient facts to advise appellant (Tr 75-76).

Van Vactor thought that if appellant went before the grand jury, appellant would be indicted for first degree murder and this fact weighed heavily with Van Vactor ** (Tr 70; Opin R 88, A-13)

If Van Vactor had seen Exhibit 6, the CII transcript of appellant's statement he would have, of course, read the cautionary statements on p 1 thereof (see A-43) as well as the similar comments at p 15 thereof (see foonote A-15). The same holds true for Exhibits 4 and 5.

** In 1954 and 1955 conviction of first degree murder in Oregon carried a mandatory death sentence, except where the trial jury in its verdict recommended life imprisonment, in which case the penalty was life imprisonment. Former ORS 163.010 (1953 Replacement Parts), quoted p 16, infra.

He also believed that the confessions would be admissible and a major factor in the trial, and he advised appellant of this fear and of his evaulation of the case. (Tr 50, 70-72, 76; Opin R 88, A-13 to A-14).

As a result of this advice appellant waived indictment and plead guilty to an information charging him with second degree murder on December 24, 1954. (Ex 2, pp 4-8; A-21 to A-24; Tr 48, 50, 51, 57-58; Opin R 88, A-14).*

Appellant was sentenced to life imprisonment on December 29, 1954. (Ex 1; Ex 2, pp 10-13; A-26 to A-29, Opin R 88, A-14).

III

QUESTION PRESENTED FOR DECISION TO THE NINTH CIRCUIT

Is the lower court's finding of fact that appellant voluntarily plead guilty because of the advice of his court appointed attorney manifestly erroneous?**

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* The relevant portions of the transcript are quoted infra, pp 12-13.

** " * * * Rule 52 (a) of the Federal Rules of Civil Procedure provides that findings of fact by the District Court shall not be set aside on appeal unless clearly erroneous, and this principle of appellate review applies as well as to habeas corpus proceedings as to other cases. Palakiko v. Harper, CA 9, 209 F.2d 79." Barber v. Gladden, 327 F2d 101, 103-104 (9th Cir. 1964)

A finding of fact is "clearly erroneous" when " * * * the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 US 364, 395, 92 L ed 746, 766 (1948).

This question arises by virtue of this appeal challenging the correctness of the lower court's findings and, particularly, appellant's assignments of error Nos. 15, 16 and 18.

IV

SUMMARY OF ARGUMENT

The court properly found from the evidence that appellant's plea of guilty was voluntarily entered and that the decision to plead guilty was based on the advice of competent counsel and that such decision was influenced by the prospect of a first degree murder charge and the gas chamber.

The circumstances attending appellant's prior interrogations and confessions played no part in appellant's decision to plead guilty, particularly because the Wasco County Circuit Court manifested to appellant in unmistakable terms that that court was there to protect appellant's rights.

Furthermore, appellant's own testimony clearly shows that he wanted to plead not guilty but decided to plead guilty only after his counsel, who was concerned about the prospect of a first degree murder charge and the gas chamber if the state's case were contested, and who determined that appellant's prior confessions would be admissible, advised appellant to plead guilty.

It may be presumed that counsel advised appellant that his confessions would be inadmissible in evidence if coerced.

A plea of guilty under such circumstances is a waiver of all prior defects in the proceedings and of all defenses, and

as long as there is no allegation and proof of incompetent counsel (and there are none in this case) the court need not try the merits of counsel's advice nor inquire into counsel's mental processes in giving such advice.

V

APPELLEE'S ANSWER TO APPELLANT'S ASSIGNMENTS OF ERROR 15, 16 AND 18

The trial court did not err in finding that appellant's plea of guilty was voluntarily entered upon the advice of competent counsel and because of the possibility that appellant would be indicted for first degree murder if the state's case was contested.

POINT AND AUTHORITIES NO. 1

Appellant's own testimony as well as that of his counsel clearly shows that appellant plead guilty to second degree murder because of the advice of his counsel so to do and because of the possibility of appellant being indicted for first degree murder if the state's case were contested.

United States v. Bayer, 331 US 532, 540-541, 91 L ed 1654, 1660 (1947)

Covey v. State, 232 Ark 79, 334 SW2d 648, 651 (1960)

Hagan v. Goldberg, 291 F2d 249, 251 (9th Cir 1961)

Brooks v. School District of Moberly, Missouri, 267 F2d 733, 739-740 (8th Cir 1959)

Jensen v. Gladden, 231 Or 141, 144, 372 P2d 183 (1962)

ORS 51.040 (1953 Replaced Parts)

ORS 51.050 (1953 Replaced Parts)

ORS 133.030 (2)

ORS 133.610 (1957 Replaced Parts)

ORS 133.620 (1957 Replaced Parts)

ORS 133.630 (1957 Replaced Parts)

ORS 135.310 (1957 Replaced Parts)

ORS 135.320 (1957 Replaced Parts)

ORS 161.030 (1) (1953 Replaced Parts)

ORS 163.010 (3) (1953 Replaced Parts)

Rule 52 (a) Federal Rules of Civil Procedure

ARGUMENT

The basic ground of appellant in this case as set out in his amended petition is that his plea of guilty was involuntary. See pp 1-2, supra.

In turn this ground rests on allegations (1) that his earlier confessions were involuntary and in violation of his constitutional rights and (2) of promises of the district attorney to recommend an early parole. See pp 1-2, supra.

Appellant's own unprompted testimony on direct and cross-examination, however, which we have quoted at length at pp 12-13, infra, clearly shows that appellant, far from being affected by his earlier confessions or the alleged promises of the district attorney to recommend an early parole, did not want to plead guilty and only did so because of the advice of his counsel.

(Tr 50, 51, 57-58).

It is true that when appellant first appeared before the Wasco County Circuit Court he told that court that he didn't want an attorney, that he had committed the crime and that he had confessed it, and that he wanted to get the court proceedings over with. (Ex 2, pp 3-4, A-20). However, the Wasco County Circuit Court refused to go along with appellant and appointed counsel for him. (Ex 2, pp 3-4, A-20).

But after this initial appearance, appellant's attitude changed and he didn't want to plead guilty. Thus although appellant construed his first appearance as a plea of guilty, in his testimony he kept reiterating that he wanted to "change his plea" and stated "I just didn't feel that I should plead guilty to second degree murder" (Tr 57) but that his attorney advised against it (Tr 50, 51, 57-58).

Thus at pp 50-51 of the transcript the following appears:

"Q So you explained, then, your decision then to plead guilty to the court?

A My decision to plead guilty?

Q Yes.

A Well, I wanted to change my plea from guilty to not guilty on this second degree murder charge, and I had talked with him about that, and he advised me not to.

Q Well, explain the discussion, Mr. Knowles.

A Well, that is it. That is the discussion, that is what we were discussing about. And I got kind of confused on that. I was thinking it was after I had pleaded guilty in court that I wanted to change my plea, but it wasn't; it was at the time I was up for

arrangements, and I thought I was pleading guilty at that time.

Q What you are saying is you initially didn't want to plead guilty although you thought you had already done so?

A That is right.

Q But you hadn't?

A But I hadn't; that is right. And I asked him if I could change my plea." (Emphasis supplied)

On cross examination we asked appellant (Tr 57):

"Why did you want to change your plea?"

Appellant answered (Tr 57-58):

"Well, I just didn't feel that I should plead guilty to second degree murder at the time. But I didn't really know much about court proceedings. Of course, I know now that I was doing wrong at the time, but after I had talked to my attorney, then he explained to me that it would be quite dangerous if I changed my plea, and that is why he advised me to still stick to the first degree murder -- excuse me -- to the second degree murder and plead guilty of it.

Q You relied on the advice of your counsel?

A Yes, sir. He was very honest with me." (Emphasis supplied)

The unprompted answer of appellant on cross-examination as o why he plead guilty and appellant's other testimony on direct xamination quoted above negative the existence of any alleged oercion, negative the existence of any promises of an early arole (expectation of parole wasn't the reason appellant gave or wanting to change his plea) and clearly shows that it was ppellant's own counsel's fear of the gas chamber that prompted

the plea of guilty.

It is not surprising that appellant felt no mental effect arising from his earlier interrogations by the police. For in appellant's initial appearance the circuit court had refused to permit appellant to waive an attorney and had refused to permit appellant to get it over with in a hurry. (Ex 2, pp 1-4, A-18 to A-20).

Thus at pp 3-4 of Ex 2 (A-20 to A-21) the following appears:

"MR. KNOWLES: I can't understand why -- I can't see any sense of having an attorney. I've already committed the crime and admitted it and I'd kind of like to have this over with.

THE COURT: Well, it can move along as fast as you desire, but the only thing is, Knowles, that I want to be sure that you're fully advised of your legal rights and you can explain whatever you wish to your attorney, take that matter up with him, and it will proceed in an orderly way. Your attorney will look after advising you in that respect and I want to know that everything is proper. The court is entitled to know that you are fully advised, you see, of every step that you take. If you want to plead guilty to the charge that's your business but you should be fully advised and have competent legal advice, particularly on a charge of murder in the second degree which is placed against you. Now, as to whether or not it would delay this matter or not, that's a thing for your and your attorney to discuss. I think that covers it. Mr. Van Vactor is here and he'll talk to you. That will be all then at this time.

MR. KNOWLES: Thank You." (Emphasis supplied)

Whatever mental affect* the earlier interrogations conceivably could have had on appellant was swept away by the court's forceful refusal to permit appellant to waive an attorney and be done with it and the court's forceful advice to appellant that appellant was entitled to be fully advised before he took further action.

In effect the court let appellant know in unmistakable terms that the court was there to protect appellant, particularly when the court said to appellant " * * * The Court is entitled to know that you are fully advised, you see, of every step that you take. * * *" (Ex 2, p 3, A-20).

In the foregoing context appellant's testimony that it was his desire to plead not guilty but that he plead guilty because of the advice of his counsel (Tr 50, 51, 57-58) is reasonable.

In this regard appellant's appointed counsel Van Vactor testified (Tr 70):

> "I will state to you that in my own mind -- he had not yet gone before the grand jury --

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* In United States v. Bayer, 331 US 532, 540-541, 91 L ed 1654, 1660 (1947) the court said:

> "Of course after the accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

> I felt that if he did go before the grand jury that they would indict him for first degree murder. And that did weigh very heavily with me at the time, and I am sure I mentioned that to him."

Counsel had a right to be worried. A mistake on his part could have meant the gas chamber for his client. Thus former ORS 163.010 (3) (1953 Replaced Parts) as it existed in 1954 and 1955 provided as follows:

> "Every person convicted of murder in the first degree shall be punished with death, except when the trial jury in its verdict recommends life imprisonment, in which case the penalty shall be life imprisonment."

With respect to the alleged promises of recommending an early parole, not only did appellant fail to mention this as a factor on his direct and cross-examination, but also former District Attorney Donald Heisler himself denied promising appellant he would recommend an early parole if appellant would waive indictment and plead guilty to second degree murder (Tr 127, 129-130). In fact there was no need to make such a promise since appellant according to Heisler was "cooperative throughout and generally friendly" (Tr 127).

Similarly both Heisler and Yakima County Prosecuting Attorney Don J. Clark denied having had any conversation concerning a parole for appellant (Tr 127, 87).

Appellant argues (App Br 27-28) that Heisler's denials were insufficient to contradict appellant's testimony because Heisler merely testified "No, sir. I do not recall that" or "No, I don't recall having any conversation about a parole with Mr. Clark for

Knowles" (Tr 127).

This form of testifying is permissible particularly after a lapse of more than 11 years is involved. Covey v. State, 232 Ark 79, 334 SW2d 648, 651 (1960):

> "Of course, a witness cannot state his impressions, conclusions, inferences, suppositions or understanding of a matter unless such answer is equivalent to a statement of the fact asked for, but witnesses are not required to give their testimony with absolute positiveness. A witness who is not positive may make a statement of a fact to the best of his recollection or belief and his testimony should not be excluded because he uses 'it is my impression,' 'I think', or a similar expression where he means that he is testifying to the best of his recollection or an indistinct remembrance of facts within his personal knowledge. 98 C.J.S., Witnesses § 355, p. 79. * * *" (Emphasis supplied)

Furthermore the lower court was not required to unqualifiedly accept the testimony of an admitted criminal (Tr 61-63) who had attempted to hide from the police the facts concerning his latest crimes (Tr 66-68).

The credibility of appellant and the other witnesses was for the trial court. Rule 52 (a), Federal Rules of Civil Procedure. (A-51). Hagan v. Goldberg, 291 F2d 249, 251 (9th Cir 1961):

> "It is for the trial court to pass on the credibility of witnesses. Where the finding involves the credibility of witnesses, if supported by substantial evidence, it is conclusive on appeal. Bloom v. United States, 9th Cir., 1959, 272 F.2d 215, 223."

See also Brooks v. School District of City of Moberly, Missouri, 267 F2d 733, 739-740 (8th Cir 1959) where the Eighth Circuit stated a trial court was not compelled to believe even

uncontradicted testimony.

Appellant argues (App Br 28-29) that former District Attorney Heisler had the "strongest motive" to make promises to appellant in order to get appellant to waive statutory procedures because the State of Oregon was given custody for only ten days (R 27, par 33, R 61, par XXII; Ex 3, p 7) at least three of which were spent in traveling between Sacramento, California and The Dalles, Oregon (Tr 131-132).

This facet of appellant's argument is ludicrous if not ridiculous.

In the first place what Mr. Heisler's motives and mental processes were is pure conjecture and the trial court was not required to disbelieve Mr. Heisler's testimony on the basis of such conjecture.

Secondly, the justice court had no statutory authority to adjudicate appellant's guilt of second degree murder, a felony, former ORS 51.040, 51.050 and 161.030 (1) (1953 Replaced Parts) (A-51 to A-53) and in 1954 no statutory authority to appoint counsel at state expense, former ORS 133.610, 133.620 and 133.630 (1957 Replaced Parts) (A-52).

Thirdly, not only was the circuit judge a magistrate, ORS 133.030 (2) (A-52), but by going to that court Heisler went to the only court with felony jurisdiction, Jensen v. Gladden, 231 Or 141, 144, 372 P2d 183 (1962), and the only court then with the express authority to appoint counsel: former ORS 135.310 and

135.320 (1957 Replaced Parts) which provided as follows:*

> "If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned and shall be asked if he desires the aid of counsel." ORS 135.310.
>
> "Whenever it appears upon arraignment of a person accused in the circuit court of a crime against the laws of this state that he is without funds and unable to retain his own counsel, the court having jurisdiction of the cause shall, upon request of the accused, appoint suitable counsel, not exceeding two, to represent him." ORS 135.320.

Fourthly, by going directly to the circuit court on Wednesday, the day after appellant arrived in Oregon (R 27, par 34, R 61, par XXII; Tr 126, 127, 129, 130) the district attorney was able to have experienced counsel immediately appointed for appellant (Ex 2, pp 3-4, A-20). Such counsel was certainly in a position to insist on a preliminary hearing as the price of holding appellant in custody further and on an indictment if he had so desired.**

Finally, the unlikelihood of a deal between the district attorney and appellant is not only belied by appellant's own

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* Technically the statutes provided for appointment of counsel only upon arraignment where there was a charge pending in the circuit court. Although no such charge was pending in the Circuit Court of Wasco County at the time appellant first appeared in circuit court the appointment of counsel as was done apparently was a customary practice. See date on information, exhibit 1.

** Heisler testified that the time for Oregon's temporary custody of appellant could have been extended or appellant returned from the federal authorities for trial at a later date (Tr 132).

testimony on direct and cross-examination (supra, pp 12-13) but also appellant's failure even to tell his counsel of any such significant event. (Tr 49-50).

For the foregoing reasons the court had ample evidence from which to find appellant's plea was not the result of any promise to recommend an early parole but rather was voluntarily entered because of the advice of competent counsel.

POINT AND AUTHORITIES NO. 2

Appellant by his voluntary plea of guilty to the charge of second degree murder on the advice of competent counsel waived all nonjurisdictional defects in prior proceedings or defenses he may have had including the purported defense that his prior statements of guilt were involuntary and inadmissible.

Thomas v. United States, 290 F2d 696, 697 (9th Cir 1961)

Snipe v. United States, 343 F2d 25, 28 (9th Cir 1965), cert den 382 US 960, 15 L ed2d 363

Wallace v. Heinze, 351 F2d 39, 40 (9th Cir 1965)

Busby v. Holman, 356 F2d 75, 77-80 (5th Cir 1966)

Waley v. Johnston, 139 F2d 117, 121 (9th Cir 1943), cert den 321 US 779, 88 L ed 1072, reh den 321 US 804, 88 L ed 1090

United States v. Gilligan, 363 F2d 961 (2d Cir 1966)

United States ex rel Cuevas v. Rundle (ED of Pa 1966)

Brookhart v. Janis, 382 US 810, 16 L ed2d 314 (1966)

Wilson v. Rose, (9th Cir, Sept. 12, 1966)

Schwensow v. Burke, 252 F Supp 336, 338-339 (ED Wis 1966)

Stein v. New York, 346 US 156, 186, 97 L ed 1522, 1543 (1953)

Jackson v. Denno, 378 US 368, 391, 12 L ed2d 908, 924 (1964)

ARGUMENT

Appellant goes to great length at pp 29-45 of his brief to demonstrate that appellant's confessions were involuntary and therefore tainted his guilty plea and made it involuntary.

We have already pointed out, pp 11-20, supra, that the trial court properly found that appellant's plea was entered voluntarily on the advice of competent counsel and because of the possibility of a first degree murder charge if a plea of not guilty was entered.

In such context the question of whether the circumstances under which the prior statements of appellant were obtained rendered one or more of those prior statements inadmissible is foreclosed and irrelevant.

For, as this court in Thomas v. United States, 290 F2d 696, 697 (9th Cir 1961) said:

> "The trial court's action in denying the motion [by a convicted defendant to vacate a sentence on the ground his indictment was based on illegally seized evidence] was not erroneous. By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his

> objection to its introduction, if made and overruled by the trial court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. * * * When a defendant voluntarily and knowingly pleads guilty at his trial this constitutes a waiver of all nonjurisdictional defenses, including the defenses raised by this motion. * * * [citing authorities] The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. * * * [citing authorities]" (Emphasis supplied)

To the same effect are Snipe v. United States, 343 F2d 25, 28 (9th Cir 1965), (footnote 5 [Escobedo type claims]), cert den 382 US 960, 15 L ed2d 363, and Wallace v. Heinze, 351 F2d 39, 40 (9th Cir 1965), (evidence illegally acquired), and Busby v. Holman, 356 F2d 75, 77-78 (5th Cir 1966), (coerced confessions).

Appellant argues, however, (App Br 45) that since appellant's counsel, Van Vactor, advised appellant to plead guilty "in ignorance of the facts establishing the involuntariness of the confessions" appellant's plea itself was consequently involuntary.

Before answering this contention directly several comments are appropriate.

First, this is not a case where the pleadings have raised any claim that appointed counsel was incompetent. The pleadings make no such claim. See pp 1-2, supra.

Secondly this is not a case where the pleading claims or the evidence proves that counsel had an insufficient time to consult with his client.

In fact, Van Vactor testified to the contrary (Tr 76):

"Q How many times did you confer with Mr. Knowels?

A It was more than once, but I could not say definitely how many times.

Q Did you feel you had adequate time to investigate the case?

A Under the circumstances of that situation, my conscience was satisfied when I finished.

Q You were not satisfied?

A My conscience was satisfied as an attorney. I felt that I was in possession of sufficient facts.

Q If you had needed more time you could have requested the Court for more time?

A I would have asked for it." (Emphasis supplied)

Nor, thirdly, are we dealing with a young and inexperienced attorney. To the contrary Mr. Van Vactor had been a member of the Oregon Bar for 22 years at the time of his appointment to represent appellant. (Tr 69).

Turning now to the facts, the evidence concerning the confessions is that appellant did not explain to his counsel "any of the circumstances or details of the questioning which led to those statements." (Tr 72).

This evidence is equivocal, however.

The quoted evidence does not establish that Mr. Van Vactor did not advise appellant that if his statements to the police were involuntary or coerced they would be inadmissible.

The quoted evidence does not establish that appellant did not advise Van Vactor that the police were gentlemen (Tr 58) and treated him very nice (Tr 64) or that appellant gave his confessions voluntarily because he wanted to get the matter "off

my chest and mind" (Ex 6, p 15; footnote A-15). From the cited references the court could have concluded that appellant had so advised Van Vactor.

In short there is no evidence definitely establishing what inquiry Van Vactor made of appellant with respect to the confessions nor what response appellant made with respect thereto.*

The evidence does establish however that on the basis of the information Van Vactor was able to obtain, he concluded that the confessions were admissible and so advised appellant (Tr 50, 72).

It may be presumed that the normal attorney-client relationship existed between Van Vactor and appellant and that Van Vactor advised appellant that if the confessions were the result of coercion they would be inadmissible. Waley v. Johnston, 139 F2d 117, 121 (9th Cir 1943), cert den 321 US 779, 88 L ed 1072, reh den 321 US 804, 88 L ed 1090.

And even if it be assumed that appointed counsel's decision that one or more of the prior confessions were admissible was erroneous or was made with insufficient information, this fact alone does not raise a federal question. Busby v. Holman, 356 F2d 75 (5th Cir 1966).

In the cited case, the appellant contended in part (356 F2d 78-79):

> " * * * that his plea of guilty was influenced by his knowledge of the fact that he had made a confession which he assumed could be used against him at the trial, and

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* See lines 16 to 22, p 49, transcript.

that his decision to plead guilty was, in reality, involuntary because he did not know when he made it that his confession could not have been so used because it was obtained by coercion and without his having been given an opportunity to consult counsel. * * *"
(Emphasis supplied)

The state answered that contention in that case by pointing out (356 F2d 79):

" * * * that the appellant had the advice of competent counsel in making his plea of guilty and cannot, therefore, now be heard to impugn his own act done under such advice."

Responding to these contentions the fifth court stated (356 F2d 79):

"In considering this contention of the appellant we must bear in mind that the constitutional requirement of effective assistance of counsel does not require or permit the court upon a subsequent review to analyze counsel's mental processes in order to determine whether every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued. United States ex rel. Boucher v. Reincke, 2 Cir. 1965, 341 F.2d 977, 981. It is not counsel who is on trial. There can be held to be a lack of the effective assistance of counsel only when it appears that counsel's assistance was so grossly inept as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. * * * [citing and quoting authorities]"
(Emphasis supplied)

Continuing on the court said (356 F2d 80):

" * * * Here the district court has found on ample evidence that the appellant's confession was voluntary and there has been no suggestion by the appellant that he did not truthfully state the facts in it. We cannot assume that counsel did not take these circumstances into account as well as the state of the law as it then was on the right to counsel during interrogation in determining whether to advise his client to plead guilty. Doubtless in giving that advice counsel took into account the fact which was known to him that the appellant's confession was corroborated by a statement by the prosecutrix, factually almost identical, which was in the possession of the circuit solicitior. The fact that if convicted the appellant faced the electric chair was another factor which must have been considered by counsel in advising the appellant to accede to the arrangement with the circuit solicitor by which on a plea of guilty he would escape the possibility of execution." (Emphasis supplied)

Concluding on this point the court said (356 F2d 80):

"However, as we have pointed out, the district court was not called upon to try the merits of the advice given by counsel to the appellant but merely to determine that counsel was not so completely inept and incompetent as to render the proceedings a farce. The district court found that the appellant was afforded the assistance of competent counsel. We are satisfied that the record amply supports that finding. Indeed the fact that the appellant is alive today may well be a testimonial to it. It follows that there is no merit in appellant's contention that his plea of guilty was not voluntarily and understandingly made because he was not properly advised by his counsel

with regard to his confession."* (Emphasis supplied)

See also Schwensow v. Burke, 252 F Supp 336, 338-339 (ED Wis 1966).

In accordance with the foregoing authorities we deem it neither necessary nor appropriate to argue the merits of Mr. Van Vactor's advice to appellant to plead guilty to a charge of second degree murder, because only Mr. Van Vactor had the awesome responsibility of determining the life or death fate of appellant, and because only Mr. Van Vactor was in a position to ascertain from his discussions with the district attorney and with appellant and from whatever other investigation he made at that time what chance the state had of proving a first degree murder charge against appellant.

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* In United States v. Gilligan, 363 F2d 961 (2d Cir 1966), the court overturned a conviction on a plea of guilty entered on the advice of counsel. However the plea in that case had been made by a 13 year old boy with a history of epilepsy and brain abnormalities and the record didn't indicate that the boy had made a reasoned choice.

United States ex rel Cuevas v. Rundle, (ED of Pa, decided September 19, 1966) holds that a plea of guilty may be challenged where the plea was made only because "able counsel" thought a coerced statement to be admissible. The case does not appear to us to be sound since in effect it holds counsel's advice must be correct. In reaching that result the court relied on Brookhart v. Janis, 382 US 810, 16 L ed2d 314 (1966), which is not in point since that case involved a defendant who advised the court he wasn't pleading guilty but the court and defendant's counsel went ahead as if he had plead guilty.

Appellant's other authorities on this point also appear to be unsound to the extent that they, with the benefit of hindsight, require correct advice rather than merely competent counsel. Wilson v. Rose, (9th Cir, Sept. 12, 1966), of course, involves grossly inept or incompetent counsel.

In exercising that responsibility Mr. Van Vactor rightly or wrongly determined that one or more of the confessions were admissible and rightly or wrongly determined that the state could prove a first degree murder case against appellant.*

Accordingly Mr. Van Vactor advised appellant as to "what was involved and the various hazards" (Tr 71) and of "the serious nature of the situation at that time" (Tr 70), and as a consequence appellant plead guilty to second degree murder. (Tr 50, 51, 57-58).

Absent an allegation of incompetence of counsel (and there is none) and proof of incompetence or gross ineptitude (and there is none) this should foreclose any further inquiry into the admissibility of the confessions.

Accordingly we deem it unnecessary to argue with appellant the point whether one or more of the confessions would have been admissible if appellant had plead not guilty and gone to trial.

However, in the event that the court may wish to consider this facet of the case further, we will briefly list the factors supportive of the voluntariness of the confessions given to the CII, which confessions were apparently the ones that influenced Van Vactor in his advice to appellant (Tr 51):

1. At each of three interviews between the FBI and appellant which dealt with Stuart, the deceased, as well as the stolen vehicle, appellant was advised that any statement he made could be used against him, that he was not required to make a

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* Actually the record doesn't show just what appellant told Van Vactor. The story appellant told Van Vactor may have convinced him that it would be both futile and dangerous to contest the state's case.

tatement, and that he had the right to consult an attorney. he interviews occurred on October 11, October 20 and October 29, 954. (Tr 138-145; Ex 14).

2. On November 18, 1954, appellant appeared in court in acramento on the Dyer Act charge arising out of his theft of tuart's vehicle and was advised of his right to counsel by the ourt in connection with that charge (Ex 3, pp 2-3).

If appellant was as ignorant of legal matters as he claims, hen it is doubtful that he distinguished between the right to ounsel in court and right to counsel by interrogation.

3. With respect to the CII investigators who commenced uestioning appellant on November 18, after appellant's court ppearance (R 22, par 10-11, R 58, par VI; Tr 23), appellant described them as "gentlemen all the way through, every bit of the ay" (Tr 58). Appellant also thought "they was treating me very ice" (Tr 64).

4. The atmosphere in which the questioning by the CII ook place was cordial and appellant at no time evidenced any eluctance to talk (Tr 105). Between investigators and appellant here "was a very pleasant exchange of conversation and words" Tr 20).

5. None of the interrogations of appellant lasted over hree or four hours (Tr 18) with only one man as the primary nterrogator (Tr 14). It was not a question and answer situation ll the way through (Tr 105).

6. Appellant was told by CII Investigator Coffey that ppellant was privileged not to talk if appellant was so

nclined (Tr 101-102, 114-115) and Coffey also advised appel-
lant that anything appellant told him Coffey was "obligated to
pass along to the people who have responsbility for handling
this investigation" (Tr 102).

7. There was no evidence of grueling relay questioning
nor of lack of sufficient rest or refreshment.

8. The polygraph test was explained to appellant (Tr 103)
and appellant was given the choice of whether or not to take the
polygraph examination (Tr 106). The interrogator again told
appellant that he was free not to talk if he felt so inclined.
(Tr 112).

9. Appellant was told some of his answers to the polygraph
examination were false (Tr 116-117).

10. There was no admission of guilt until the day follow-
ing the polygraph examination on November 20, 1954 (Tr 25-26)*.

11. The questioning subsequent to November 20 was to fix
the location of the body (Tr 105).

12. Appearance by appellant in Federal District Court again
on November 23, 1954 (Ex 3, p 5). If appellant had been any
way mistreated he could certainly have appealed to that court.

13. Admission by appellant to CII Investigator Coffey
in absence of Prosecutor Don J. Clark (Ex 6, p 2) on afternoon

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* In Stein v. New York, 346 US 156, 186, 97 L ed 1522, 1543 (1953), (overruled on other grounds in Jackson v. Denno, 378 US 368, 391, 12 L ed2d 908, 924 (1964)) the court pointed out that no confession to the police after interrogation is "voluntary" in the sense that the confessor wants to admit guilt or in the sense that it is spontaneous as in a confession to a priest. The court in that case also pointed out that the confessions came after the suspects were convinced "that their dance was over and the time had come to pay the fiddler." 346 US at 186, 97 L ed at 1543.

of Decmeber 1, 1954 that no promises or threats, rough treatment or duress of any sort had been used on appellant to obtain his confessions (Ex 6, p 1). See also pp A-42 to A-43 of Appendix.

14. Admission by appellant at same questioning that he knew that his statement could be used against him at the trial but that he wanted to get his guilt "off my chest and mind" (Ex 6, p 15, footnote A-15).

VI

CONCLUSION

We submit that the evidence is clear that appellant's plea of guilty was a voluntary choice made after consultation with competent counsel and, therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon

PETER S. HERMAN
Assistant Attorney General

Attorneys for Appellee

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER S. HERMAN
Assistant Attorney General

A P P E N D I X

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

---oOo---

HARRY C. KNOWLES, Petitioner,	)	Civil No. 64-121
vs.	)	
CLARENCE T. GLADDEN, Warden, Oregon State Penitentiary, Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This is an application for release of Harry C. Knowles from the Oregon State Penitentiary on a writ of habeas corpus.

FINDINGS OF FACT

On October 18, 1954, Harry Knowles was arrested by agents of the United States and taken before a United States Commissioner in Tallahassee, Florida, for preliminary hearing on an information charging him with the interstate transportation of a stolen 1950 Chevrolet pickup truck which had belonged to one Albert Calvin Stuart. He was forty-six years old at the time but was unable to read or write well, having attended elementary school only through the fourth or fifth grade.

Prior to his arrest by federal authorities, Knowles had been incarcerated in the County Jail at Apalachicola, Florida, and on October 11, 1954, was interviewed there by Charles L. Carroll, a special agent of the Federal Bureau of Investigation. Carroll questioned Knowles with respect to the federal motor

ehicle theft charge for three quarters of an hour or one hour, ut Knowles denied knowing anything about the Chevrolet pickup r Stuart's whereabouts.

Carroll advised Knowles that any statement he made could e used against him, that he was not obliged to make any state- ents, and that he had the right to consult an attorney. Knowles estified he was first told that he might have assistance of ounsel in connection with the federal charge when he appeared efore the United States Commissioner, but that the Commissioner aid " * * * It doesn't make any difference whether you have got n attorney or not, they are going to take you back to California."

On October 20, 1954, agent Carroll interviewed Knowles second time at the Federal Correctional Institution in Talla- assee. The interrogation lasted one and a half or two hours. t the trial, Carroll produced a statement prepared in his hand- riting, dated October 20, 1954, which was signed by Knowles. he statement related solely to the motor vehicle theft charge nd contained recitals to the effect that Knowles had been advised f his right to consult an attorney and of the fact that the tatement could be used against him.

Agent Carroll interviewed Knowles a third time, on ctober 29, 1954, for a period of about two hours, and he repeated he advice he had given Knowles during the previous interviews.

Knowles remained in federal custody in Florida throughout ctober and the first half of November, 1954. Meanwhile, however, had become the prime suspect in a probable homicide involving he owner of the vehicle he was charged with having stolen. The alifornia Bureau of Criminal Identification and Investigation

CII) had undertaken the investigation of the suspected homicide nd made preparations to interrogate Knowles upon his arrival in alifornia.

In an effort to obtain incriminating statements from nowles, Investigator Charles E. Casey, of the CII, contacted he chief jailor of the Sacramento County Jail on November 11, 954, and with his cooperation, installed a microphone in a cell n the fifth floor of the Jail and a recording unit in the attic f the building. No useful information was obtained from the evice.

On November 12, 1954, Knowles was indicted by a federal rand jury, sitting in Sacramento, California, for violation of he National Motor Vehicle Theft Act, and on November 15, 1954, as transported to Sacramento by train, arriving there at four 'clock p.m. on Wednesday, November 17, 1954.

At 9:30 o'clock a.m. on Thursday, November 18, 1954, nowles appeared in the United States District Court in Sacramento or arraignment on the indictment. He was advised by the Court hat he was entitled to an attorney to assist in the defense of he federal charge, but he declined counsel and entered a plea of uilty, which the Court accepted.

Later that same morning, at approximately eleven o'clock m., Knowles was taken to the office of the United States Marshal n Sacramento and interrogated there by Investigators Charles E. sey and A. L. Coffey of the CII about his responsibility for e disappearance and probable death of Stuart. Knowles was inter- gated until 4:30 o'clock p.m. but made no incriminating state- nts.

The object of the interrogation on November 18 was to repare Knowles for a polygraph (lie detector) test, and for that eason, Investigator Coffey, who was not earlier connected with he investigation, played the principal role in the interrogation.

Coffey had been connected with law enforcement agencies or twenty-three years (since 1931), and had acquired expertise s a polygraph specialist through practical experience and uni- ersity training. His education in these matters extended over is entire career in law enforcement and he had taken university ourses in subjects relevant to the interrogator's art, such as sychology and physiology.

To secure Knowles' consent to the test, and to obtain is confidence and prepare him emotionally in order to insure seful results, Coffey undertook to develop a rapport with Knowles. e testified that an air of antagonism would have limited the ffectiveness of the examination and that the development of a ordial, friendly atmosphere was prescribed procedure in preparing or a polygraph test. Coffey's prime objective was to create a leasant atmosphere because such a relationship is more conducive o a meaningful test which may readily be interpreted.

To help achieve the necessary rapport and to obtain nowles' consent to the test, Coffey manifested an attitude of pparent neutrality so far as the conduct of the examination was ncerned. He represented to Knowles that he was there to estab- sh the true facts and was as eager to develop facts beneficial Knowles as facts detrimental to him. He told Knowles: " **** at I am a completely neutral participant in this thing; my only nction is to establish as nearly as possible the true facts of

ne situation * * *." Knowles was not advised of his right to onsult with counsel nor told that his statements could be used gainst him in Court. Coffey stated: " * * * I am here in an fficial capacity, and anything that I get, anything that you rovide me, I am obligated to pass along to the people who have esponsibility for handling this investigation."

On Friday, November 19, 1954, Knowles was again taken o the office of the United States Marshal in Sacramento and nterrogated by CII Investigators Coffey and Casey from 11:15 a.m. ntil 4:30 p.m. During the course of the interrogation, Investi- ator Coffey, administered a polygraph test to Knowles lasting bout one and a half hours, during which Knowles was questioned xtensively about his responsibility for the death of Stuart. lthough Knowles did not incriminate himself during this interro- ation, when the polygraph test was completed Coffey told him that me of his answers were false.

While administering the polygraph test, it was necessary o establish a "normal" response by asking Knowles a number of rrelevant questions and occasionally interjecting a question ertinent to the investigation. The admitted object of this rocedure was to cause Knowles to relax so that his reaction to mportant questions would be more readily apparent to the investi- tor than otherwise.

The advice given Knowles regarding his rights on November , if any, was no different from that given the previous day.

Knowles was interrogated again on Saturday, November 20, 54, in the Sacramento County Jail by Investigators Coffey and sey for two or three hours beginning at 9:30 a.m. As a result

of the interrogations, Knowles finally orally admitted killing Stuart. Coffey told Knowles that if he cooperated, "it would be a lot easier for me if I did." Knowles was given no advice on November 20 regarding his right to remain silent and his right to counsel.

At 9:30 o'clock a.m. on the morning of Monday, November 22, 1954, Knowles was taken before the United States District Court in Sacramento to be sentenced on his conviction for violation of the Dyer Act, but sentencing was postponed until December 14, 1954. This postponement was arranged for the express purpose of permitting the CII investigators additional time to interrogate Knowles.

Knowles was again interrogated on November 22, beginning at 11:30 a.m., by Investigators Coffey and Casey, in the United States Marshal's office. He was still being interrogated at 1:30 p.m. that afternoon. Knowles was not told of his right to remain silent or of his right to counsel during this interrogation.

The CII investigators arranged with the federal probation officer for further postponements of Knowles' sentencing should it become necessary to engage in additional interrogations. The CII report states: "On November 24, 1954, Investigator Casey contacted George S. Ford, Jr. U.S. Probation and Parole Officer, Federal Building, Sacramento. Mr. Ford was interested in knowing about Knowles and in his activities prior to the time of his arrest on federal charges, Mr. Ford was extremely cooperative and guaranteed this investigator that if additional time was needed for questioning the subject, he believed this time could be granted by arranging same with the federal judge."

Knowles was again interrogated by the CII investigators on Tuesday, November 30, 1954, in the United States Marshal's office. To the best of Knowles' recollection, he was questioned from approximately 8 a.m. to 11:30 a.m., and from 1 p.m. until 3:30 or 4 p.m. Don J. Clark, the Prosecuting Attorney of Yakima County, Washington, was present during this interrogation because Knowles believed the death of Stuart had occurred in Yakima, Washington. Clark stated that he did not give Knowles any cautionary instructions during the interrogation.

On Wednesday, December 1, 1954, beginning not later than 10:25 a.m., Knowles was interrogated in the office of the United States Marshal in Sacramento by Prosecuting Attorney Clark and Deputy Sheriff Dell Young of Yakima County, Washington, and by Investigator Casey of the CII, in an attempt to obtain from Knowles a written statement admitting that he had caused the death of Stuart in Yakima, Washington. Clark did not make any promises or threats to Knowles.

Knowles agreed to give Clark a written confession, and Clark then prepared a statement in his own handwriting which Knowles signed. Clark prepared the statement for use in a subsequent prosecution.

Clark corrected a number of mistakes in the statement which he had made intentionally, and then had Knowles initial the corrections in accordance with a common police procedure for establishing that a witness has read a statement. Since Knowles was unable to read, he placed his initials on the statement according to Clark's instructions. Clark had told Knowles he did not have to talk, and that any statement he made could be used

against him.

During the afternoon of Wednesday, December 1, 1954, Knowles was further interrogated by Investigator Coffey of the CII between the hours of 2 p.m. and 3:02 p.m. in the presence of Prosecuting Attorney Clark, Deputy Sheriff Young, and CII Investigator Casey.

On Thursday, December 2, 1954, at the request of the CII and officials of Yakima County, Washington, Sergeant Charles U'Ren of the Oregon State Police filed a petition for a writ of habeas corpus ad prosequendum in the Circuit Court of Oregon for Hood River County, seeking Knowles' release from federal custody ostensibly for the purpose of prosecuting him on a larceny complaint filed in Hood River Justice Court on September 30, 1954. The Circuit Court granted the petition and issued the writ.

On Friday, December 10, 1954, the United States District Court in Sacramento entered an order releasing Knowles into the custody of the Sheriff of Hood River County, and Knowles was then transported into Oregon by automobile, arriving in Klamath Falls on Friday, December 10, 1954. During the trip into Oregon, Knowles was accompanied by CII Investigator Casey, Sergeant U'Ren and Sheriff Gillmouthe of Hood River County, who questioned him about the location of Stuart's body and the details of his trip into Oregon with Stuart in 1953. He was given no advice regarding his rights during questioning.

On Sunday, December 12, 1954, Stuart's body was located and exhumed at Shaniko, Oregon. Knowles was interrogated further at the site by Lt. Tucker of the Oregon State Police, Prosecuting Attorney Clark and CII Investigator Casey, and as a result of

the interrogation, admitted killing Stuart at Shaniko, Oregon. Knowles was not advised of his right to counsel or of his right to remain silent during the interrogation.

At approximately 3:30 p.m. on Sunday, December 12, 1954, Knowles was returned to Oregon State Police Headquarters at The Dalles, Oregon, and Prosecuting Attorney Clark introduced him to District Attorney Donald Heisler of Wasco County, Oregon. Clark told Heisler, " * * * This fellow has been very cooperative with us all the way along the line."

During the evening of Sunday, December 12, 1954, starting at approximately 7:45 p.m., Knowles was interrogated further at Oregon State Police Headquarters in the presence of Sergeant U'Ren, Lt. J. Eric Tucker and Captain Gurdane, all of the Oregon State Police, and Ernest Mosier, Sheriff of Wasco County, Investigator Casey of the CII, Donald E. Heisler, District Attorney for Wasco County and M. D. Van Valkenburgh, Deputy District Attorney of Wasco County. During the interrogation, District Attorney Heisler prepared a typewritten statement in narrative form which Knowles signed. A number of typographical errors were corrected and the officials had Knowles initial the corrections. Knowles acknowledged in the statement that the statement was given voluntarily and without fear, threats or promise of reward, and after having been told that the statement could be used against him.

Although Knowles' temporary release from federal custody was accomplished by means of a writ of habeas corpus obtained for the alleged purpose of prosecuting him in Hood River County for larceny, at no time while he was in the custody of the Oregon

authorities was he taken before the Justice Court of Hood River, or any other magistrate, for arraignment and preliminary hearing on the larceny complaint filed in the Justice Court.

On Monday, December 13, 1954, Knowles was returned by automobile to the custody of the United States Marshal in Sacramento, California.

On Tuesday, December 14, 1954, Knowles again appeared before the United States District Court in Sacramento, but sentencing was further postponed at the request of the probation officer.

On Wednesday, December 15, 1954, the Sheriff of Wasco County, Oregon, filed an information in the Justice Court of The Dalles charging Knowles with murder in the second degree, and a warrant for Knowles' arrest was issued by that Court. On Friday, December 17, 1954, a petition for a writ of habeas corpus ad prosequendum was filed in the Circuit Court of Wasco County to obtain the release of Knowles from federal custody, and a writ was issued the same day.

On Monday, December 20, 1954, Knowles appeared before the United States District Judge in Sacramento who honored the writ of habeas corpus and ordered that Knowles be released in the custody of the Oregon authorities on condition that he be returned to federal custody in Sacramento on or before December 30, 1954, ten days later. Sheriff Mosier of Wasco County and District Attorney Heisler transported Knowles to The Dalles by automobile, arriving there during the afternoon of Tuesday, December 21, 1954. During the trip, Knowles was questioned about his travels with Stuart but he was not advised of his

ight to remain silent or of his right to assistance of counsel.

On Wednesday morning, December 22, 1954, after arranging o have the case heard that morning by the Circuit Court of Wasco ounty, Heisler visited Knowles in the Wasco County Jail. Heisler ad a conversation with Knowles on the morning of December 22, 954, but he did not represent that if Knowles would waive indict- ent and plead guilty to an information charging second degree urder, he (Heisler) would recomend an early parole. At the onclusion of this conversation, Knowles was taken directly before he Circuit Court of Wasco County even though he had not been rraigned in Justice Court on the information filed there, given n opportunity for a preliminary hearing, or indicted by the rand jury. This procedure presupposed that Knowles would waive reliminary hearing and indictment.

When Knowles appeared in Court that morning, he sought o waive counsel and plead guilty, but the Court declined to ermit him to do so and appointed Sam Van Vactor, an attorney racticing in The Dalles, Oregon, to represent him.

After his appointment, Van Vactor conferred with Knowles. e obtained Knowles' story and discussed the case with the District ttorney. Knowles told Van Vactor of his prior confessions but id not explain the details or the circumstances which led to them. or did he mention his conversations with Hesiler. Van Vactor's ecollection was that he was not shown the written statements ich had been obtained from Knowles.

Van Vactor thought, however, that if the case were pre- nted to the grand jury, Knowles would be indicted for first gree murder, and he believed that the confessions would be a

"major factor" in a trial. He advised Knowles of this fear and of his evaluation of the case. As a result of this advice, Knowles waived indictment and pleaded guilty to an information charging him with second degree murder on December 24, 1954. He was sentenced to life imprisonment on December 29, 1954.

O P I N I O N

The Court's conclusions of law are contained in the following brief opinion, and if facts are stated, the Court finds them to be true.

While the uniform excellence of the work of George L. Kirklin, Court appointed attorney for Petitioner in this case, would require granting the relief sought if this were a contest between counsel, the Court cannot, in good conscience, order the release of an admitted murderer whose case was properly investigated in accordance with Constitutional standards applicable in 1954. The rules of Escobedo and Miranda are not retroactive.

Petitioner voluntarily and with full understanding of the consequences pleaded guilty to the offense of second degree murder. No law enforcement officer abused or mistreated Petitioner in any way during interrogation. No false statements or representations were made to Petitioner to persuade him to confess. He was not promised a recommendation for early parole. The totality of circumstances does not show that his will to remain silent was overborne by coercion tactics. On the contrary, after voluntarily submitting to a polygraph examination, his decision to confess was prompted primarily by his conscious-

ness of guilt,[1] fortified by knowledge that his fingerprints had been found on the deceased's vehicle and that he had "flunked" the lie detector test.

Similarly, the decision to plead guilty to an information charging second degree murder was reached voluntarily after consideration of the advice of competent counsel, Mr. Sam Van Vactor. It was not the product of a promise of recommendation for early parole, as no such promise was made. Admittedly, it was influenced by the possibility of being exposed to an indictment charge of first degree murder. While the circumstances of the homicide as related in the confessions, which we presume are the same facts told Van Vactor by Knowles, leave open for consideration the degree of criminal homicide of which Knowles might have been convicted, it is not the province of a Court to second-guess the judgment of a local attorney. One reason local attorneys are appointed or retained to represent defendants is that they have knowledge of the attitudes of the people who comprise the grand and petit juries and are better able to form

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1/ In his stenographically reported statement to CII investigators, Knowles said:

"Q-- Again I would like to repeat, has anybody offered you anything in the way of promises or used any threats or violence or anything of that sort to induce you to make this statement?

"A-- Absolutely no. No.

"Q-- And you make this statement knowing that it is possible that anything you say in there may be used during the course of trial?

"A-- Yes. Well, I want to get it off my chest and mind, and now I can feel like a free man. It is impossible to know what it is to do anything like that."

judgment concerning the possibilities inhering in the case. We conclude that Knowle's (sic) decision to plead guilty to second degree murder was voluntarily and justifiably reached in prospect of the possibility of facing a charge of first degree murder in the trial of which his conduct in failing to notify authorities of the victim's death, his secret burial of the victim's body, his theft of the victim's property and his flight from the scene of the crime would be weighed against the credibility of the exculpatory portions of his confessions. We may, in considering habeas corpus twelve years after the event, reasonably speculate that evidence may have been available to refute the imputation in the confessions of homosexual characteristics of the victim, which, if produced, would have left Knowles entirely exposed to conviction for first degree murder.

J U D G M E N T

IT IS ORDERED, ADJUDGED AND DECREED that the petition for a writ of habeas corpus be, and it hereby is, denied.

Dated: June 23, 1966.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

EXHIBIT II

TRANSCRIPT OF WASCO COUNTY PROCEEDINGS

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR WASCO COUNTY

STATE OF OREGON, Plaintiff, vs. HARRY CECIL KNOWLES, Defendant.	)	No.

BE IT REMEMBERED That heretofore, to-wit, on the 22nd day of December, 1954, at the hour of 11:30 o'clock A.M., the above-entitled cause came regularly on for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney, and
Mr. M. D. Van Valkenburgh, Assistant District Attorney;
in behalf of the State of Oregon;
Mr. Harry Cecil Knowles, in his own behalf.

(Thereupon the following proceedings were had, to-wit:)

MR. HEISLER: If the Court please; this is the time set for taking up the matter of the State of Oregon vs. Harry Cecil Knowles, who is in Court in the custody of the sheriff.

THE COURT: Now, Knowles, do you have an attorney?

MR. KNOWLES: No, sir.

THE COURT: Do you desire to have an attorney?

MR. KNOWLES: No, sir.

THE COURT: Well, under the law the Court may appoint an attorney for you if you're without funds and if you desire one. The thing is you're charged here in this Court with murder in the second degree, as I understand the matter, and of course that's a very serious crime and I feel personally that you should have legal advice on this matter to advise you of all of your legal rights as the different steps proceed. Now, I don't know what your background is particularly and whether you fully realize the import of having an attorney or not and the thing is an attorney would advise you step by step of the full procedure here and what your rights are, your legal rights guaranteed to you under our constitution and our judicial system and the statutes of the State of Oregon. For that reason I feel that you should have an attorney appointed to advise you as you go along on the matter. Do you have anything you desire to say in that respect?

MR. KNOWLES: No, sir.

THE COURT: You feel that you don't need one really yourself, is that it?

MR. KNOWLES: That's right.

THE COURT: How far did you go in school?

MR. KNOWLES: I had no education.

THE COURT: Well, you haven't had any real experience then with a serious charge, of course?

MR. KNOWLES: I have not.

THE COURT: Well, I think under these conditions you should be represented by counsel on the matter and I'm going to appoint Mr. Sam Van Vactor, one of our attorneys here in The Dalles to advise you on this matter before we go any further.

I want to know that your legal rights are fully protected. Mr. Van Vactor, you will take care of that before we go any further. I feel that this should be done on such a serious charge. That will be all then at this time and you confer with Mr. Van Vactor and report into the Court.

MR. KNOWLES: Well, Your Honor, could I say something, please?

THE COURT: Yes.

MR. KNOWLES: I can't understand why -- I can't see any sense of having an attorney. I've already committed the crime and admitted it and I'd kind of like to have this over with.

THE COURT: Well, it can move along as fast as you desire, but the only thing is, Knowles, that I want to be sure that you're fully advised of your legal rights and you can explain whatever you wish to your attorney, take that matter up with him, and it will proceed in an orderly way. Your attorney will look after advising you in that respect and I want to know that everything is proper. The Court is entitled to know that you are fully advised, you see, of every step that you take. If you want to plead guilty to the charge that's your business but you should be fully advised and have competent legal advice, particularly on a charge of murder in the second degree which is placed against you. Now, as to whether or not it would delay this matter or not, that's a thing for you and your attorney to discuss. I think that covers it. Mr. Van Vactor is here and he'll talk to you. That will be all then at this time.

MR. KNOWLES: Thank you.

(Thereupon the hearing was concluded.)

THEREAFTER, on the 24th day of December, 1954, at the hour of 10:15 o'clock A.M., the above-entitled cause came regularly on for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney;
in behalf of the State of Oregon;
Mr. Sam Van Vactor, of Brown and Van Vactor;
in behalf of the defendant.

(Thereupon the following proceedings were had, to-wit:)

THE COURT: Now at this time the Court is ready to take up the matter of the State of Oregon v. Harry Cecil Knowles. You've had an opportunity to confer with your attorney?

MR. KNOWLES: Yes, sir.

THE COURT: And at this time are you ready to go ahead, Mr. Van Vactor?

MR. VAN VACTOR: Yes, Your Honor; we've gone over the matter thoroughly in the last couple of days and the defendant has not changed his mind as to the entry of his plea.

THE COURT: He's been fully advised then of his legal rights. By that, I mean, your right to have your case presented to the Grand Jury of this County if you so desire. On the other hand, you may come into Court and consent to the District Attorney filing an Information against you which charges you with the crime for which you are held. That procedure has all been

explained to you, has it, Mr. Knowles?

MR. KNOWLES: Yes; Your Honor.

THE COURT: Is it then your wish to waive presentment of this matter to the Grand Jury and consent to the District Attorney filing an Information against you? Is that your wish, or not?

MR. KNOWLES: That's right, sir.

THE COURT: We have a form of waiver of presentment of matters to the Grand Jury here that has been used here in the last year. Mr. Van Vactor, you can check it over and it covers these matters and if it's satisfactory why he may sign it.

(Thereupon the defendant read the waiver and signed the same.)

THE COURT: All right; I'll enter an order waiving presentment of this matter to the Grand Jury and you may proceed with the arraignment, Mr. Heisler.

MR. HEISLER: Your true name is Harry Cecil Knowles?

MR. KNOWLES: Yes.

MR. HEISLER: The information reads as follows: "In the Circuit Court of the State of Oregon for Wasco County - The State of Oregon, Plaintiff, vs. Harry Cecil Knowles, Defendant. Information for violation of O.R.S. 163.020. The above named defendant, Harry Cecil Knowles, having appeared before the Honorable M. W. Wilkinson, Judge of the above entitled Court, and waived indictment by Grand Jury, is accused in this Information by Donald E. Heisler, District Attorney of the State of Oregon for Wasco County, of the crime of MURDER IN THE SECOND DEGREE, committed as follows: That the said defendant, Harry Cecil Knowles, on the 21st day of September, 1953, in the County

of Wasco, State of Oregon then and there being, did then and there unlawfully and feloniously, purposely and maliciously kill one Albert Calvin Stuart by then and there choking and strangling the said Albert Calvin Stuart. Contrary to the statutes in such cases made, provided and against the peace and dignity of the State of Oregon. Dated at Dalles City, Oregon, this 24th day of December, 1954. Donald E. Heisler, District Attorney of the State of Oregon for Wasco County. Witnesses examined and available for prosecution: Sheriff Ernest Mosier, Sgt. Charles U'Ren, Dr. Homer H. Harris, James H. Mulvey, Sheriff R. L. Gillmouthe, Lt. J. Eric Tucker, Charles E. Casey, Harry Cecil Knowles, voluntarily making statement.

THE COURT: And you have delivered a copy to him. Well now, under the law, Knowles, you aren't required to enter your plea to the information which has just been read to you until after a day has passed unless you desire to waive that time and enter your plea at this time. You may consult with your attorney if you wish and let me know what your wish is in that respect. What is your wish as to waiving time for entering plea?

MR. KNOWLES: I don't get that, Your Honor.

THE COURT: Pardon?

MR. KNOWLES: I don't understand that.

THE COURT: What is your wish in respect to waiving time for entering your plea? Under the law I can't require you to enter your plea to the information or this charge which has just been read to you until after one day has passed unless you're willing to waive that time. If you want to go ahead now why you'll have to inform the Court as to whether or not you want to

and by that you would waive your time for entering your plea. If you do not waive the time we'll have to set the matter over, of course, until some subsequent time or a later time. Do you understand?

MR. KNOWLES: I see.

THE COURT: You can talk to Mr. Van Vactor about it.

MR. KNOWLES: I'll waive it and have it over with.

THE COURT: You want to waive time for entering plea?

MR. KNOWLES: Yes.

THE COURT: All right, let the record so show. What plea do you enter, guilty or not guilty?

MR. KNOWLES: Guilty, sir.

THE COURT: Your plea of guilty will be received. Now at this time under the law the Court cannot pass sentence until after two days has passed on a plea of guilty and there are some matters involved that I think it would be best to set the time for passing sentence over to Monday afternoon, that's this coming Monday, that will be December 27th. That's satisfactory to you, is it, Mr. Van Vactor?

MR. VAN VACTOR: That will be satisfactory, Your Honor.

THE COURT: We'll set the time for passing sentence then for two o'clock on Monday, December 27th. That will be all at this time.

(Thereupon the hearing was concluded.)

THEREAFTER on the 27th day of December, 1954, at the hour of 2:45 o'clock P.M., the above-entitled cause came regularly on

for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled Court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney;
in behalf of the State of Oregon;
Mr. Sam Van Vactor, of Brown and Van Vactor,
in behalf of the defendant.

MR. HEISLER: If the Court please, last Friday we left the matter with the Court and that the California authorities would be contacted, that is the Federal authorities in Sacramento, to see whether or not they would release their jurisdiction to the State of Oregon. We've had, as a result of the Christmas holiday in between, not sufficient time to work this out and I would like to request a day or so more time to see if we can work this matter out with them.

THE COURT: Do you have anything you wish to say, Mr. Van Vactor?

MR. VAN VACTOR: No; we're agreeable.

THE COURT: You're agreeable to continuing the time for passing sentence on this until this matter can be cleared with the Federal Court in California, the question of jurisdiction?

MR. VAN VACTOR: I have just talked to the defendant.

THE COURT: You understand, Mr. Knowles, there is a question of jurisdiction involved on this offense in California and we want to get, as I understand it, we're trying to clear this matter of jurisdiction so that we know where we are on it. A day or two may make some difference in getting the word back and finally getting it cleared up. I'll continue the matter of passing

sentence over and will not set a definite time here but I'll ask the District Attorney and counsel, Mr. Van Vactor, to attempt to get this matter cleared up in the course of the next day or two. At that time we'll notify you.

(Thereupon the hearing was concluded.)

THEREAFTER on the 29th day of December, 1954, at the hour of 10:45 o'clock A.M., the above-entitled cause came regularly on for hearing before the Honorable M. W. Wilkinson, Judge of the above-entitled Court, presiding:

APPEARANCES:

Mr. Donald E. Heisler, District Attorney, and
Mr. M. D. Van Valkenburgh, Assistant District Attorney,
in behalf of the State of Oregon;
Mr. Sam Van Vactor, of Brown and Van Vactor,
in behalf of the defendant.

THE COURT:

This is the time set for passing sentence on the matter of the State of Oregon vs. Harry Cecil Knowles and would you care to make a statement, Mr. Heisler before sentence is passed?

MR. HEISLER: Yes; I want to make a brief statement, Your Honor. The defendant has confessed that he committed this crime in Wasco County on September 21, 1953, in a trailer house which belonged to the deceased, Albert Calvin Stuart, and thereafter the body was buried where it was found south of Shaniko just off of the highway extending from the Cow Canyon road leading to Shaniko. Now, the defendant was born in 1907 and his occupation has been pretty much that of a fruit picker and various diversified occupations. He was born in Bangor, Maine and prior, on about September 19, 1953 he and the deceased left California for

the Yakima Valley and proceeded northward up U. S. Highway 99 to the scene of this crime. The defendant must be returned to the District Court of the United States for the Northern District of California, northern division, for sentencing on the Dyer Act, for violation of the Dyer Act. He's heretofore entered a plea of guilty under that charge but has been turned over to us by the California authorities and as I say, must be returned to them pursuant to the understanding by which he was turned over to us. I think that is all I have to say, Your Honor, unless you have some questions.

THE COURT: Would you care to make a statement, Mr. Van Vactor?

MR. VAN VACTOR: Well, I would only like to say, Your Honor, that this unfortunate affair occurred in the course of a struggle between the two men, the deceased and the defendant. It occurred after there had been considerable drinking going on on the part of both parties. It is a matter which this defendant is now fully and completely repentant and may the record show that he has attempted to cooperate now just as far as it possible for him to do so.

THE COURT: Do you have anything, Knowles, you want to say?

MR. KNOWLES: No, sir.

THE COURT: Well, under the Oregon law -- I know you must have been advised by your counsel -- that second degree murder, the charge to which you have entered a plea of guilty, calls for a mandatory life sentece (sic). You've been advised

f that, I'm sure.

MR. KNOWLES: Yes.

THE COURT: And that is the law of this state. There's o discretion as far as the Court is concerned in the time of entence, it's a mandatory proposition entirely and I know you ealize that. Now, there is this other matter of the charge in he Federal Court down in Sacramento in which you entered a plea f guilty prior to coming here on this charge and to which you ill have to answer Federal authorities and it's my understanding rom the District Attorney and from all concerned that you'll ave to be returned to them for sentencing down there on that harge.

It's the Judgment of this Court that you are guilty of he crime of murder in the second degree as defined by O.R.S. 63.020. It's further ordered, adjudged and decreed that the aid Harry Cecil Knowles be confined to the State Penitentiary at alem, Oregon, for the duration of his natural life, and said mprisonment shall commence from the date of the expiration of he imprisonment under that certain sentence to be imposed upon uch defendant in the District Court of the United States for the orthern District of California, Northern Division, for violation f the Dyer Act, for which a plea of guilty has been received rior hereto, and that he be and he is hereby remanded to the ustody of the Sheriff of Wasco County for delivery to the said istrict Court of the United States for the Northern District of alifornia, Northern Division, for sentencing on said Federal harge. I might say in that connection I am proceeding under ection 137.160 of the Oregon Revised Code where a person has

been convicted of two crimes before judgment on either, Mr. Van Vactor.

It is further ordered, adjudged and decreed that the Sheriff of Wasco County, Oregon, cause to be placed with the proper officer in charge of the institution to which said defendant is committed by the Federal authorities a hold order requesting said defendant to be held for the Sheriff of Wasco County, Oregon, upon completion of such Federal sentence, and the sheriff of Wasco County is further ordered to secure and deliver said defendant to the State Penitentiary at Salem, Oregon, for service of this sentence hereby imposed upon completion of such sentence to be imposed by the District Court of the United States for the Northern District of California, Northern Division. That will be all.

(Thereupon the hearing was concluded.)

STATE OF OREGON)
) ss:
COUNTY OF WASCO)

I, LILLY H. SJOBLOM, Official Court Reporter for the Seventh Judicial District of the State of Oregon, hereby certify that I reported in shorthand the testimony and proceedings had in the above-entitled cause at the hearings had therein before the Honorable M. W. Wilkinson, Circuit Judge, presiding; that I subsequently caused my said shorthand notes to be reduced to typewriting; and that the foregoing transcript, pages number 1 to 13, both inclusive, contains a full, true and accurate record of all the evidence given, objections and motions made, rulings thereon and exceptions taken; and that no exhibits were offered

evidence during said hearings.

DATED at The Dalles, Oregon, this 26th day of November D., 1958.

/s/ Lilly H. Sjoblom
OFFICIAL COURT REPORTER

BACKGROUND EVENTS OCCURRING PRIOR

TO APPELLANT'S PLEA OF GUILTY*

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* As we previously stated, this part of our statement of facts in our opinion is neither necessary nor relevant to the decision in this case. See question presented for decision, supra p 8 . We say this because appellant's own testimony that he did not want to plead guilty but did so because of his counsel's advice, see pp 12-14, supra, indicates that the prior statements that appellant gave the police were not, so far as appellant was concerned, a factor in his decision to plead guilty.

Nevertheless we have set out these circumstances in the appendix, because we do not entirely agree with petitioner's statement thereof at pp 3-16 of his brief and because the lower court made findings of fact thereon and because this court may wish to examine our version of these facts. Reference to "Opin" indicates that the fact stated is the same as that found by the court.

On October 18, 1954, appellant was arrested by agents of the United States and taken before a United States Commissioner in Tallahassee, Florida, for preliminary hearing on an information charging him with the interstate transportation of a stolen 1950 Chevrolet pickup truck which had belonged to one Albert Calvin Stuart. (R 22, par 7; R 58, par VI, Opin R 78, A 3).

Appellant was 46 years old at the time but was unable to read or write well, having attended elementary school only through the fourth or fifth grade. (Tr 22, Tr 144; Opin R 78-79; A 3).

Prior to his arrest by federal authorities appellant had been incarcerated in the county jail at Apalachicola, Florida, and on October 11, 1954, was interviewed there by Charles L. Carroll, a special agent of the Federal Bureau of Investigation. (Tr 138-139; Opin R 79, A 3).

Carroll questioned appellant with respect to the federal motor vehicle theft charge for three quarters of an hour or one hour, but appellant denied knowing anything about the Chevrolet pickup or Stuart's whereabouts. (Tr 64, 67-68, 138-140, 146, Opin R 79; A 3-4).

Appellant explained his refusal to admit knowing Stuart, the deceased, as follows (Tr 68):

"THE COURT: Why weren't you willing to admit your friendship with Mr. Stuart?

THE WITNESS: Well, I didn't really believe that they had anything on me. They didn't tell me that they had my fingerprints and that is how they traced me from the time I left Mr. Stuart. See, we lived together for a while. I didn't believe they had anything on me." (Emphasis supplied)

Carroll advised appellant that any statement he made could be used against him, that he was not obliged to make any statements, and that he had the right to consult an attorney. (Tr 139-140, 145; Opin R 79, A 4).

On October 20, 1954 agent Carroll interviewed appellant a second time at the Federal Correctional Institution in Tallahassee. (Tr 140; Opin R 79, A 4). This interrogation lasted one and a half or two hours. (Tr 146; Opin R 79, A 4).

At the trial Carroll produced a statement prepared in his handwriting, dated October 20, 1954, which was signed by appellant. The statement related solely to the motor vehicle theft charge and contained recitals to the effect that appellant had been advised of his right to consult an attorney and of the fact that the statement could be used against him. (Ex 14; Tr 141-143; Opin R 79, A 4).

On October 29, 1954 agent Carroll interviewed appellant a third time, for a period of about two hours, and he repeated the advice he had given appellant during the previous interviews. (Tr 143-144; Opin R 79, A 4). At this last interview, as well as on the previous two interviews, appellant was also asked as to whether or not he knew of the whereabouts of Stuart (Tr 144, 67), but appellant wouldn't talk to Carroll about Stuart (Tr 67-68).

Appellant remained in federal custody in Flordia throughout October and the first half of November, 1954. Meanwhile, however, he had become the prime suspect in a probable homicide involving the owner of the vehicle (Stuart) which he was charged with having stolen. The California Bureau of Criminal Identification

and Investigation had undertaken the investigation of the suspected homicide and made preparation to interrogate appellant upon his arrival in California (Ex 10, pp a, b; Opin R 79-80, A 4-5).

In an effort to obtain incriminating statements from apellant, Investigator Charles E. Casey of the CII contacted the chief jailor of the Sacramento County Jail on November 11, 1954, and with his cooperation, installed a microphone in a cell on the fifth floor of the jail and a recording unit in the attic of the building. (Ex 8; Tr 10; Opin R 80, A 5). No useful information was obtained from this device. (Tr 10-11, 115-116; Opin R 80, A 5).

On November 12, 1954, appellant was indicted by a federal grand jury in Sacramento, California for violation of the National Motor Vehicle Theft Act, and on November 15, 1954 was transported to Sacramento by train, arriving there at 4:00 p.m. on Wednesday, November 17, 1954. (R 22, par 8; R 58, par VI; Opin R 80, A 5).

At 9:30 o'clock a.m. on Thursday, November 18, 1954, appellant appeared in the United States District Court in Sacramento for arraignment on the indictment. (Ex 3, p 2; Opin R 80, A 5). He was advised by the court that he was entitled to an attorney to assist in the defense of the federal charge, but he declined counsel and entered a plea of guilty, which the court accepted. (Ex 3, pp 2-4; Opin R 80, A 5).

(A)

ATMOSPHERE OF INTERROGATIONS OF APPELLANT CONDUCTED BY CII

Later that same morning at approximately 11:00 a.m., appellant was taken to the office of the United States Marshal in Sacramento for interrogation there by Investigators Charles E. Casey and A. L. Coffey of the CII (R 22, par 11, R 58, par VI; Tr 23; Opin R 80, A 5).

Mr. Casey who was one of appellant's interrogators testified that none of appellant's interrogations lasted over three or four hours (Tr 18). He also testified (Tr 20-21):

> " * * * Mr. Knowles was most cooperative with us. It was a very pleasant exchange of conversation and words. At no time did we ever, as I recall, were there ever any raised voices or anything else in this regard. It was a very amicable interrogation of a witness or of a suspect."

Appellant himself was asked the following questions and gave the following answers concerning Mr. Casey and Mr. Coffey (Tr 58):

> "Q Now, did you have a friendly relationship with Mr. Casey and Mr. Coffey?
>
> A Well, just what do you mean by 'friendly'?
>
> Q Well, did you consider them gentlemen?
>
> A Yes, sir, they was. They was gentlemen all the way through, every bit of the way."

Later appellant in response to a question of the trial court testified (Tr 64):

> " * * * I knew that I had to answer each question that they asked me, and I answered

way it was all the way through. I thought they was treating me very nice. * * *" (Emphasis supplied)

Mr. Coffey, the polygraph expert (Tr 99) testified as to the atmosphere existing with appellant as follows (Tr 105):

"Well, we got acquainted during the first interview, which was, I think, about as long as any of them. There was an interchange of cigarettes; there was small talk along the line-- it was not a question and answer situation all the way through-- and there was never anything but a very cordial atmosphere. Mr. Knowles evidenced at no time any reluctance to talk, and at no time appeared to be unwilling to talk." (Emphasis supplied)

(B)

DETAILS OF INTERROGATIONS

OF APPELLANT

At the first interview appellant was interrogated about his responsibility for the disappearance and probable death of Stuart. (R 22, par 11, R 58, par VI; Tr 23; Opin R 80, A 5). Appellant was interrogated until 4:30 p.m.* but made no incriminating statements. (R 22, par 11, R 58, par VI; Tr 23; Opin R 80, A 5).

The object of the interrogation on November 18 was to prepare appellant for a lie detector test and for that reason, Investigator Coffey, who was not earlier connected with the investigation (Tr 114; Opin R 81, A 6), played the principal

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* Apparently there was a break for lunch because according to the testimony of Charles Casey none of the interrogations with appellant lasted over three or four hours (Tr 18).

role in the interrogation. (Tr 100; Opin R 81, A 6).

Coffey had been connected with law enforcement agencies for 23 years and had acquired expertise as a polygraph specialist through practical experience and university training. His education in these matters extended over his entire career in law enforcement and he had taken university course in subjects relevant to the interrogator's art, such as psychology and physiology. (Tr 113; Opin R 81, A 6).

To secure appellant's consent to the test, and to obtain his confidence and prepare him emotionally in order to insure useful results, Coffey undertook to develop a rapport with appellant. (Tr 100-101, 106-107; Opin R 81, A 6). Coffey testified that an air of antagonism would have limited the effectiveness of the examination and that the development of a cordial, friendly atmosphere was prescribed procedure in preparing for a polygraph test. (Tr 108; Opin R 81, A 6). Coffey's prime objective was to create a pleasant atmosphere because such a relationship is more conducive to a meaningful test which may readily be interpreted. (Tr 111, Opin R 81, A 6).

To help achieve the necessary rapport and to obtain appellant's consent to the test, Coffey manifested an attitude of apparent neutrality so far as the conduct of the examination was concerned. (Tr 107; Opin R 81, A 6).

He represented to appellant that he was there to establish the true facts and was as eager to develop facts beneficial to appellant as facts detrimental to him. (Tr 107; Opin R 81, A 6).

Coffey told appellant, " * * * That I am a completely neutral participant in this thing; my only function is to

establish as nearly as possible the true facts of the situation. * * *" (Tr 101; Opin R 81, A 6-7).

Appellant was not advised of his right to counsel or that his statements could be used against him in court (Tr 101; Opin R 81-82, A 7). Coffey did advise petitioner, however, that " * * * I am here in an official capacity, and anything that I get, anything that you provide me, I am obligated to pass along to the people who have responsibility for handling this investigation." (Tr 102; Opin R 82, A 7). Coffey also told appellant that appellant was privileged not to talk to Coffey if appellant was so inclined. (Tr 101-102, Tr 114-115).

On Friday, November 19, 1954 appellant was again taken to the office of the United States Marshal in Sacramento and interrogated by CII Investigators Coffey and Casey from 11:15 a.m. until 4:30 p.m.* (Ex 11, p 36; R 23, par 13, R 59, par VIII, Opin R 82, A 7).

During the course of the interrogation, Investigator Coffey administered a polygraph test to appellant lasting about one and one half hours.

Prior to the giving of the polygraph test on that date Coffey explained to appellant what the polygraph test was, how the questions would be asked and how appellant would answer them, and that if a question was not truthfully answered it would be reflected in the polygraph. (Tr 103). Appellant consented to the test and evidenced no reluctance to undergo the examination. (Tr 106).

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* See footnote p A-36, supra.

During the polygraph test appellant was questioned extensively about his responsibility for the death of Stuart. (R 23, par 14, R 59, par IX, Opin R 82, A 7). Although appellant did not incriminate himself during this interrogation (Tr 25; Opin R 82, A 7), when the polygraph test was completed, Coffey told appellant some of his answers were false. (Tr 116-117; Opin R 82, A 7).

While administering the polygraph test, it was necessary to establish a "normal" response by asking appellant a number of irrelevant questions and occasionally interjecting a question pertinent to the investigation. The admitted object of this procedure was to cause appellant to relax so that his reaction to important questions would be more readily apparent to the investigator than otherwise. (Tr 103, 111; Opin R 82, A 7).

The advice given appellant regarding his rights on November 19, if any, was no different from that given the previous day (Opin R 82, A 7) except that appellant was told by Coffey that appellant was free not to talk if he felt so inclined. (Tr 112).

Appellant was interrogated again on Saturday, November 20, 1954, in the Sacramento County Jail by Investigators Coffey and Casey for two or three hours beginning at 9:30 a.m. (Ex 11, p 36; Tr 25-26; Opin R 82, A 7). As a result of the interrogations, appellant finally orally admitted killing Stuart. (Tr 26; R 24, par 19, R 60, par XIII, Opin R 82, A 8). Coffey told appellant that if he cooperated "it would be a lot easier for me if I did." (Tr 28; Opin R 82, A 8). Appellant was given no advice on November 20 regarding his right to remain silent and his right to counsel. (Tr 26-27; Opin R 83, A 8).

At 9:30 a.m. on Monday, November 22*, 1954 appellant was taken before the United States District Court in Sacramento to be sentenced on his conviction for violation of the Dyer Act, but sentencing was postponed until December 14, 1954. (Ex 3, p 5; Opin R 83, A 8). This postponement was arranged for the express purpose of permitting the CII investigators additional time to interrogate appellant. (Ex 11, p 36; Opin R 83, A 8).

Appellant was again interrogated on November 22, beginning at 11:30 a.m. by Investigators Coffey and Casey in the United States Marshal's office (Ex 11, p 36; R 60, par XIV, Opin R 83, A 8). Appellant was still being interrogated at 1:30 p.m. that afternoon. (Ex 11, p 37; Opin R 83, A 8). Appellant was not told of his right to remain silent or of his right to counsel during this interrogation.** (Tr 29; Opin R 83, A 8).

Inasmuch as appellant had already orally admitted killing Stuart at the interrogation of November 20, 1954, (Tr 25-26; Opin R 82, A 7-8) the purpose of the interrogation on November 22 and the remaining interrogations was to fix the location of the body. (Tr 105).

The CII investigators arranged with the federal probation officer for further postponements of appellant's sentencing should it become necessary to engage in additional interrogations.

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* The court appears to be in error since Ex 3, the transcript of federal proceedings, indicates that the date was Tuesday, November 23. The date used by the court comes from Ex 11, p 36, the CII Report.

** The CII attempted to tape this interrogation, (Tr 29, 95) but through the error of Investigator Casey the tape erased and did not record (Tr 95). That was the only tape recording ever attempted on appellant by the CII (Tr 95-96).

The CII report states: "On November 24, 1954, Investigator Casey contacted George S. Ford, Jr. U.S. Probation and Parole Officer, Federal Building, Sacramento. Mr. Ford was interested in knowing about Knowles and in his activities prior to the time of his arrest on federal charges. Mr. Ford was extremely cooperative and guaranteed this investigator that if additional time was needed for questioning the subject, he believed this time could be granted by arranging same with the federal judge." (Ex 11, p 37; Opin R 83, A 8).

Appellant was again interrogated by the CII investigators on Tuesday, November 30, 1954, in the United States Marshal's office. (R 60, par XIV; Ex 11, p 38; Opin R 83, A 9).

To the best of appellant's recollection, he was questioned from approximately 8 a.m. to 11:30 a.m. and from 1 p.m. until 3:30 or 4 p.m. (Tr 30-31; Opin R 83, A 9).

Don J. Clark, the Prosecuting Attorney of Yakima County, Washington was present during this interrogation (Tr 30, 79-81; Opin R 84, A 9) because appellant believed the death of Stuart had occurred in Yakima, Washington (Ex 11, p 38; Opin R 84, A 9). Clark stated he did not give appellant any cautionary instructions during the interrogation (Tr 87-88; Opin R 84, A 9).

On December 1, 1954, beginning not later than 10:25 a.m. appellant was interrogated in the office of the United States Marshal in Sacramento by Prosecuting Attorney Clark and Deputy Sheriff Dell Young of Yakima County, Washington and by Investigator Casey of the CII, in an attempt to obtain from appellant a written statement admitting that he had caused the death of Stuart in Yakima, Washington (R 24-25, par 21, R 60, par XV;

Tr 31; Opin R 84, A 9).

Clark did not make any promises or threats to Knowles (Opin R 84, A 9). In this regard Clark testified (Tr 83-85):

"Q Now, to get one thing straight, Mr. Clark, before Mr. Knowles signed this statement did you read the entire statement back to him?

A I read the entire statement to him. He was very cooperative. There was no problem at all about him giving me the statement. The essence of the statement he had given to us many times prior; I mean, any time we would ask him, he would just give it to us.

* * *

Q Now, in taking this statement, prior to taking this statement did you promise or represent to Mr. Knowles that if he cooperated with you he would only be charged with second degree murder?

* * *

A Did I promise him anything? My answer is no.

Q Did you promise that you would recommend an early parole if he cooperated with you?

A No.

Q Did you make any statement that the State of Washington would put a rope around his neck for murder?

A No."

Further, in Ex 6, the transcribed statement of appellant taken in the afternoon of December 1, 1954, following the morning interrogation by Clark above mentioned, the following appears (Ex 6, p 1):*

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* During the quoted preliminary questions Clark was not in the room. Thus at the bottom of p 2 of Ex 6, the following appears:

"Q For purposes of the record, Prosecuting Attorney, Don J. Clark just entered the room. You know Mr. Clark also, Shorty?

A Yes."

"COFFEY: Harry, we have met before. My name is, as you know, Al Coffey, State Bureau of Criminal Identification and Investigation. You have met Charles E. Casey, of the same, and Dell Young of Yakima, Washington, and a few minutes ago I introduced you to Mrs. Parker who is the shorthand reporter here. The thing we came up here for is to take a shorthand statement from you so that we can enlarge on this statement you gave to Mr. Clark, who is the District Attorney, or Prosecuting Attorney from Yakima County, Washington. Now before we go any further, I would like to ask you at this time, at this point, if during this time you have been down here and and (sic) having a conversagion (sic) with Pat Casey and myself and with Clark, the prosecutor from Yakima whether or not anybody along the line has made you promises or has used any threats or any rough treatment or duress of any sort. Has anybody done that?

A Absolutely no.

Q We have not told you that we would intercede for you or do anything other than treat the case on its own merits?

A * * * Absolutely no." (Emphasis supplied)

See also footnote, p A-15 supra, which contains similar questions and answers given at the close of the statement.

Returning now to the morning interrogation of December 1, 1954, appellant agreed to give Clark a written confession, and Clark then prepared a statement in his own handwriting which appellant signed. (Ex 4; Tr 82-84; Opin R 84, A 9). Clark prepared the statement for use in a subsequent prosecution (Tr 82; Opin R 84, A 9).

Clark corrected a number of mistakes in the statement which he had made intentionally and then had appellant initial the corrections in accordance with a common police procedure for establishing that a witness has read a statement. (Tr 85, Opin

R 84, A 9). Clark had told appellant that he did not have to talk, and that any statement he made could be used against him. (Opin R 84, A 9-10).

In this regard Clark testified as follows (Tr 82):

"Q Before questioning Mr. Knowles on that date did you give him any cautionary instructions?

A Due to the fact that I was looking for a body only-- and before we took the statement I told Mr. Knowles, I explained to him that he didn't have to talk to me and that, 'You should have an attorney,' and recommended strongly that he have an attorney; my thought being the attorney would tell him that the location of the body isn't going to make any difference, 'tell them where the body is.'"

Further the last sentence of Ex 4, p 4, recites:

"I am aware of the fact that whatever I say or said herein may be used against me."

This recital was read to appellant before appellant signed the statement because Clark testified (Tr 83-84):

"Q Now, to get one thing straight, Mr. Clark, before Mr. Knowles signed this statement did you read the entire statement back to him?

A I read the entire statement to him. * * *"

And at pp 91-92 of the transcript Clark so testified on cross-examination.

During the afternoon of Wednesday, December 1, 1954, appellant was further interrogated by Investigator Coffey of the CII between the hours of 2 p.m. and 3:02 p.m. in the presence of Prosecuting Attorney Clark* and CII Investigator

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* Clark, however, was not present during the initial questions. See footnote p A-42 supra.

Casey* (R 25, par 24, R 60, par XVII; Ex 6; Opin R 84, A 10).

On Friday, December 10, 1954, the United States District Court in Sacramento entered an order releasing appellant into the custody of the Sheriff of Hood River County, and appellant was then transported into Oregon by automobile, arriving in Klamath Falls on Friday, December 10, 1954. (R 26, par 26, R 61, par XVIII; Ex 11, p 40; Opin R 85, A 10).

During the trip into Oregon, appellant was accompanied by CII Investigator Casey, Sergeant U'Ren and Sheriff Gillmouthe of Hood River County, who questioned him about the location of Stuart's body and the details of his trip into Oregon with Stuart in 1953. (Tr 36-37; Ex 13, p 1; Opin R 85, A 10). He was given no advice regarding his rights during questioning. (Tr 37; Opin R 85, A 10).

On Sunday, December 12, 1954, Stuart's body was located and exhumed at Shaniko, Oregon. (R 26, par 27, R 61, par XIX, Opin R 85, A 10). Appellant was interrogated further at the site by Lt. Tucker of the Oregon State Police, Prosecuting Attorney Clark and CII Investigator Casey, and as a result of the interrogation admitted killing Stuart at Shaniko, Oregon. (R 61, par XIX; Ex 11, p 42; Opin R 85, A 10-11).

Appellant was not advised of his right to counsel or of his right to remain silent during the interrogation. (Tr 38; Opin R 85, A 11).

At approximately 3:30 p.m. on Sunday, December 12, 1954, appellant was returned to Oregon State Police Headquarters at

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* See p A-43, supra, and footnote p A-15, supra, which contain the cautionary instructions given during this interrogation.

The Dalles, Oregon, (Ex 11, p 43; Tr 38; Opin R 85, A 11), and Prosecuting Attorney Clark introduced him to District Attorney Donald Heisler of Wasco County, Oregon (Tr 40; Opin R 85, A 11). Clark told Heisler "This fellow has been very cooperative with us all the way along the line." (Tr 87; Opin R 85, A 11).

Clark also testified that he did not have any discussion with District Attorney Heisler concerning a parole for appellant. (Tr 87). Heisler also testified that he didn't have such a conversation with Clark (Tr 127).

During the evening of Sunday, December 12, 1954, starting at approximately 7:45 p.m. appellant was interrogated further at Oregon State Police Headquarters in the presence of Sergeant J'Ren, Lt. J. Eric Tucker and Captain Gurdane all of the Oregon State Police, Ernest Mosier, Sheriff of Wasco County, Investigator Casey of the CII, Donald E. Heisler, District Attorney for Wasco County, and M. D. Van Valkenburgh, Deputy District Attorney for Wasco County. (Ex 5; Tr 41, 121-122; Opin R 86, A 11).

During the interrogation, District Attorney Heisler, prepared a typewritten statement in narrative form which appellant signed. (Ex 5; Tr 121-123; Opin R 86, A 11). A number of typographical errors were corrected and the officials had appellant initial the corrections (Tr 123; Opin R 86, A 11).

Appellant acknowledged in the statement that the statement was given voluntarily and without fear, threats or promises of reward, and after having been told that the statement could be used against him. (Ex 5; Tr 122-123). The mentioned cautionary instructions were given to appellant at the beginning of the statement (Tr 122-123). The statement was read back to appellant

after it was completely typed and before appellant signed the statement (Ex 5, p 3; Tr 123).

Although appellant's temporary release from federal custody was accomplished by means of a writ of habeas corpus ad prosequendum for the alleged purpose of prosecuting appellant in Hood River County for larceny, at no time while appellant was in the custody of the Oregon authorities was he taken before the Justice Court of Hood River, or any other magistrate, for arraignment and preliminary hearing on the larceny complaint filed in the justice court (R 26, par 29, R 61, par XXI; Opin R 86, A 11-12).

On Monday, December 13, 1954, appellant was returned by automobile to the custody of the United States Marshal in Sacramento, California. (R 27, par 30, R 61, par XXII, Opin R 86, A 12).

On Tuesday, December 14, 1954, appellant again appeared before the United States District Court in Sacramento, but sentencing was further postponed at the request of the probation officer. (Ex 3, p 6; Opin R 86, A 12).

On Wednesday, December 15, 1954, the Sheriff of Wasco County, Oregon, filed an information in the Justice Court of The Dalles, charging appellant with murder in the second degree and a warrant for appellant's arrest was issued by that court (Tr 133; Opin R 86, A 12).

On Friday, December 17, a petition for a writ of habeas corpus ad prosequendum was filed in the Circuit Court of Wasco County to obtain appellant's release from federal custody and a writ was issued the same day. (R 27, par 31, 32, R 61, par XXII, Opin R 87, A 12).

On Monday, December 20, 1954, appellant appeared before the United States District Judge in Sacramento who honored the writ of habeas corpus and ordered that appellant be released in the custody of the Oregon authorities on condition that he be returned to federal custody in Sacramento on or before December 30, 1954, ten days later. (R 27, par 33, R 61, par XXII, Opin R 87, A 12).

Sheriff Mosier of Wasco County and District Attorney Donald Meisler of Wasco County (Tr 118) transported appellant to The Dalles by automobile, arriving there during the afternoon of Tuesday, December 21, 1954. (R 27, par 34, R 61, par XXII, Opin R 87, A 12). During the trip appellant was questioned about his travels with Stuart but he was not advised of his right to remain silent or of his right to assistance of counsel. (Tr 46; Opin R 87, A 12-13).

T A B L E

RE: ADMISSION OF EXHIBITS

Exhibit No.	Identified	Offered	Reviewed
1-7	6-7	6-7	7
8, 10-13		17	17
14	141-142	142	143

STATUTES CITED IN BRIEF

ule 52 (a) Federal Rules of Civil Procedure:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Jan. 21, 1963, eff. July 1, 1963."

RS 51.040 (1953 Replaced Parts):

"A justice's court has jurisdiction of the following crimes committed or triable in their respective counties:

"(1) Larceny, where the punishment may be imprisonment in the county jail or by fine.

"(2) Assault, and assault and battery, not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties.

"(3) Any misdemeanor defined and made punishable by ORS 164.430.

"(4) Any misdemeanor defined and made punishable by ORS 166.120 or 166.130.

"(5) Any misdemeanor defined and made punishable by any provision of ORS 164.840, 167.525 and 783.600.

"(6) Any misdemeanor defined and made punishable by ORS 453.320 and subsection (9) of ORS 453.990."

RS 51.050 (1953 Replaced Parts):

"In addition to the criminal jurisdiction of justices' courts already conferred upon and exercised by them, justices' courts have jurisdiction of all misdemeanors committed or triable in their respective counties, where the punishment prescribed does not exceed three months' imprisonment in the county jail, or a fine of not more than $100."

RS 133.030 (2):

"The following persons are magistrates:

"(2) Judges of the circuit court;"

RS 133.610 (1957 Replaced Parts):

"When the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate shall immediately inform him of the charge against him and of his right to the aid of counsel before any further proceedings are had."

RS 133.620 (1957 Replaced Parts);

"The magistrate shall allow the defendant a reasonable time to send for counsel and shall adjourn the examination for that purpose. Upon the request of the defendant, the magistrate may require a peace officer to take a message to such counsel in the precinct, town or village the defendant names. The officer, when required by the magistrate, shall take the message without delay."

RS 133.630 (1957 Replaced Parts):

"Immediately after the appearance of counsel or if, after waiting a reasonable time, none appears or if the defendant does not require counsel, the magistrate shall proceed to examine the case."

ORS 161.030 (1953 Replaced Parts):

"(1) Crimes are divided into felonies and misdemeanors.

"(2) A felony is a crime which is punishable with death or by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary.

"(3) Every crime not included in subsection (2) of this section is a misdemeanor."